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**South Coast Hospice, Inc. and Cherrill F. Corliss,
Petitioner and International Longshore and
Warehouse Union, Local 5.** Case 36–RD–1607

August 2, 2006

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held August 15, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 12 against the Union, with 7 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings and recommendations.¹

DIRECTION

IT IS DIRECTED that the Regional Director for Region 19 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Michelle Whitus, Kim Kylo, and Barbara Bates. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 2, 2006

¹ In directing a hearing in this case on 6 of the 7 challenges, the Regional Director concluded that the question of whether or not voter Staci Standlee was an employee on the date of the election would be determined through the parties' grievance procedure.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the challenges to the ballots of voters Michelle Whitus and Kim Kylo and to sustain the challenge to voter Wendy Kohanes. Accordingly, the disposition of challenges to the ballots of Cherrill Corliss, Lori Barton, and Barbara Bates are before the Board on exceptions. We agree with the hearing officer, for the reasons stated in his report, that employees Corliss and Barton were ineligible to vote under *Davison-Paxon Co.*, 185 NLRB 21 (1970), and that employee Bates was on disability leave and had neither resigned nor been affirmatively discharged as of the time of the election, and was therefore eligible to vote under *Red Arrow Freight Lines*, 278 NLRB 965 (1986). The Board has recently reaffirmed the *Red Arrow* standard in *Home Care Network, Inc.*, 347 NLRB 82 (2006). The dissent does not dispute Bates' eligibility under the *Red Arrow* standard.

Wilma B. Liebman , Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would sustain the challenge to the ballot of employee Barbara Bates. As discussed in my partial dissent in *Home Care Network*, 347 NLRB 82 (2006), I would not apply the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986), to determine the voting eligibility of individuals who are absent from their unit positions for medical reasons. Rather, consistent with the standard applied by the Board regarding laid-off employees,¹ I would examine whether, as of the date of the election, the employee has a reasonable expectancy of returning to the unit. Applying that standard, I would find Bates ineligible to vote in the election.

Bates, a registered nurse, sustained an ankle injury in May 2001. After a brief period of light duty work, Bates was off work entirely by the end of 2001 and remained so as of the August 15, 2002 election.² According to the Employer, no work was available within her medical restrictions.

On August 13, the Employer's workers' compensation insurer informed the Employer that it had reached a global settlement agreement with Bates' attorney. The agreement provided that Bates would resign her employment with the Employer effective August 20. Also under the global settlement, a stipulation and settlement agreement was filed with the State Workers' Compensation Board concerning her claim. That document states that the parties agreed to its terms on August 14.

Thus, as of the date of the election, Bates had no reasonable expectancy of returning to the unit. She was therefore not eligible to vote.

Dated, Washington, D.C. August 2, 2006

Robert J. Battista , Chairman

NATIONAL LABOR RELATIONS BOARD

¹ See, e.g., *Madison Industries*, 311 NLRB 865 (1993); *S&G Concrete Co.*, 274 NLRB 895 (1985).

² All dates are 2002 unless otherwise indicated.